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**Remarks by CPCS Chief Counsel William J. Leahy,  
Joint House and Senate Ways and Means Committee Hearing  
March 18, 2003**

**1. The Portion of the CPCS Budget Which Funds All Our Staff and Operations  
Has Twice Been Cut Severely, and Should Not be Reduced Yet Again**

Everything CPCS does, from its highly visible statewide Public Defender representation to its certifying, training, oversight, payment and auditing of the 2,564 private counsel who represented poor people in 250,821 cases in FY02, is funded through four budget lines: 0321-1500, 1502, 1503 and 1504. Total funding in those lines plummeted from \$17.355 million in FY01, to \$16.792 million in FY02, and to \$16.021 million in FY03--a reduction of over \$1.3 million, or 7.7%. These cuts have forced us to reduce staff at all levels. We have reduced our secretarial staff to the bare minimum; we have, reluctantly, all but eliminated staff social workers in our public defender offices; and the cuts have required us to leave at least a dozen public defender positions vacant. During the past two years, we have lost about 10% of our small statewide public defender staff. This is more than regrettable. It is also fiscally irresponsible: for our data shows that every vacant public defender position costs an extra \$65-\$70,000 in order to pay private counsel to provide representation in those cases.

Any further cuts in this relatively small (16.4%) part of our total funding which is dedicated to staff would not save money; it would actually cost money. To shift even more of the most complicated and serious felony cases from the Public Defenders to private counsel would not only cost more; it would also exacerbate the developing crisis in the availability of sufficient numbers of certified private counsel to meet the caseloads and enable the courts to operate efficiently.

For both fiscal and judicial reasons, therefore, this is no time to further reduce the staff of this agency by imposing additional reductions in budget lines 0321-1500 through 1504.

## 2. The Governor's Proposals Do Not Address the True Causes Driving Counsel Costs: We Propose Alternatives Which Do

The Governor's key "cost reduction" proposal--a "flat fee" for pretrial work in District court criminal cases, accompanied by a dramatically elevated \$65 hourly rate for trial representation before either judge or jury--would not save money in a badly underfinanced system which now features a meager \$30 hourly rate, and average per-case compensation of \$191 in FY02. This rate, as illustrated at page seven of our handout, "Hourly Rate Comparison" is shockingly low relative to comparable jurisdictions, which are experiencing similar fiscal crises to ours. We oppose flat fees, as I recently explained in the CPCS Report to the Legislature, because they "establish a disincentive for thorough preparation and aggressive defense advocacy," as found by the 1986 statewide evaluation which persuaded the Legislature to eliminate "flat fee" compensation from this Commonwealth.

Furthermore, the success of any flat-fee proposal depends upon the preexistence of an hourly rate high enough to provide an incentive for lawyers to bid on contracts which, in the end, save money for the state. It is said that Wisconsin has saved in this fashion. But Wisconsin limits contracting to misdemeanor cases, as this proposal does not; Wisconsin's hourly rate is \$40 per hour, not \$30; and Wisconsin's system, to its discredit, is truly "flat fee": that is, there is no exception for complicated cases, or for trial work. To his credit, the Governor has proposed a significantly higher hourly rate for trial work; one that dwarfs the existing rates not only for District Court cases, but Superior Court and even murder case rates as well. It is very likely that, overall, the Governor's proposal would cost more in additional trial compensation than it could save in pre-trial compensation. It is not, given the considerations just sketched, a proposal which offers any significant cost savings for FY04.

To actually reduce costs, one must first determine the factors which drive costs. In Massachusetts, what drives cost is not generous or growing hourly rates: our rates have been stagnant, and are among the lowest in the nation. Nor is it true (except in a specific area such as sexually dangerous person commitment cases, where the 1999 law authorizing lifetime "civil" commitment upon completion of one's prison sentence has more than doubled average hours billed and cost per SDP case) that lawyers are billing more hours per case. Our data shows that the average number of hours billed for all criminal cases during FY02 was 6.69 hours; almost exactly equal to the average for the previous five fiscal years of 6.68 hours.

It is not the cost of each case, but the increasing number of cases, which drives CPCS costs, and which must be confronted if costs are to be controlled. From FY96 to FY02, CPCS absorbed almost 25,000 additional new assignments (from 172,000 in FY96 to over 196,000 in FY02) and almost 30,000 total cases (from 221,000 in FY96 to almost 251,000 in FY02). Analysis of our data shows that there are many cost-inducing factors which can be identified and addressed. Here are just a few examples:

- (i) Unnecessary Misdemeanor Assignments: Every year, as shown by page three of our handout, the Commonwealth expends about \$2.2 million in counsel costs on over 14,000 cases which qualify as civil infractions under G.L. c.277, §70C. Our

amendment to give judges discretion to treat these cases as civil infractions passed both Legislative branches last session, but was vetoed by former Governor Swift. Governor Romney's staff is now taking a fresh look at this cost-saving proposal. This amendment should become law this year.

- (ii) Excessive Probation Revocation Assignments: The more than five-fold increase in these assignments over the last ten years (page five of our handout), and the quantum leap in the past year, have had a serious impact on counsel costs. In FY02 alone, the staggering 9,600 case increase in probation surrender assignments cost CPCS over 1.3 million dollars in additional private counsel costs. Administrative treatment of just half this increase would have saved over \$650,000 in counsel costs in FY02 alone.
- (iii) Increased Care and Protection Assignments: From FY96 to FY02, the number of new Care and Protection assignments rose by almost 1,300, or fifteen per cent. These cases are among our most expensive, averaging over \$800 per active case in recent years. Our effort to improve quality and control the cost of these cases is significantly hampered by the complete absence of any staff presence in all counties except Essex and Hampden. It makes both good fiscal and policy sense to add a third CPCS Children and Family Law office in metropolitan Boston, where the cost per assignment is highest, as we have proposed.
- (iv) Excessive Sex Offender Registration "Reachback": Unlike most states, Massachusetts' sex offender registration and dissemination couples an extremely lengthy retroactive application, with extensive administrative and judicial procedures including the right to counsel. It has taken a very long time--since 1996--but the sex offender fiscal "train" has left the station, and is rapidly gathering speed. We have been issuing fiscal warnings, and urging drastic curtailment of the "reachback" period, for years. Now, however, we have reached a state of impending fiscal impact. At an average of \$345 per assignment last year, when the flow of SORB cases began as a mere 31-case trickle, it is easy to project that the ultimate cost of providing required representation in thousands of these cases will be fiscally disastrous. At one point several years ago, the executive branch and a key legislative committee appeared close to consensus to restrict the reach back period. It is now time to accomplish this long overdue and essential reform.
- (v) The Fiscal Need for Cost-Effective Sentencing Reform: Massachusetts could save tens of millions of dollars annually by eliminating, or at least modifying, its fiscally ruinous reliance on destructive and ineffective mandatory drug sentences. Other states are finally seeing the wisdom of this course (*New York Times*, Dec. 26, 2002, "Michigan to Drop Minimum Sentence Rules for Drug Crimes; *Boston Globe*, March 11, 2003, "Study finds drug treatment works better, costs less than prison"). During the prosperous nineties, every effort to implement the Sentencing Commission's carefully crafted (and unanimously endorsed by its judicial, defender and prosecutor members) proposal fell afoul of a sentencing feeding frenzy which, had it succeeded, would have made this difficult fiscal crisis even worse. Now, when the need to save scarce public dollars is intense, and the ineffectiveness and unfairness of harsh mandatory drug sentences has been proved, it is time for

Massachusetts to save dollars and protect the public safety, by enacting smart and cost-effective reform.

**3. The Serious and Long Ignored Inadequacy of Private Counsel Hourly Rates and CPCS Staff Attorney Salaries Should Be Addressed in This Budget**

On this 40<sup>th</sup> anniversary of the Supreme Court's right-to-counsel decision in Gideon v. Wainwright, 372 U.S. 335 (1963), it is appropriate to direct your attention to the gross inadequacy of the hourly rates of compensation which we pay to those attorneys who nobly fulfill a society's obligation to provide representation to poor people against whom the power of the state is arrayed. The hourly rate comparison chart at page seven of our handout presents the comparison graphically. My recent article which appeared in the *Boston Herald* attempts to explain why Massachusetts must act to remedy this inadequacy. In recognition of the continuing fiscal crisis, we have requested only a small beginning increase, as a first step toward full implementation of the hourly rates established by CPCS in December, 2002. This initial step is far too long overdue, to be asked to await our eventual economic recovery.

Our staff attorney salaries likewise pale in comparison to those of a nearby state such as Connecticut (handout, page eight). But one does not have to look outside Massachusetts to establish the second-class salaries paid to CPCS staff lawyers. Along with assistant district attorneys and assistant attorneys general, our lawyers share the most challenging and important legal positions in all of state government. Yet they are paid at eighty cents on the dollar compared to state lawyers who may never see a courtroom or try a case; much less a case with a person's liberty at stake. There is simply no satisfactory response to the point that CPCS attorneys, and the Commonwealth's prosecutors, should be paid no less than other state-employed counsel.

**4. There is an Urgent Need for CPCS Staff Counsel to Represent Children and Families**

Anyone examining the provision of counsel for the poor in Massachusetts for the first time would immediately note the dichotomy between felony cases, in which public defenders and assigned private counsel share responsibility; and the representation of children charged with delinquency offenses and children and their families who enjoy the right to counsel in State Intervention (Care and Protection) cases, in which almost all representation is provided by private counsel. A mixed assignment system for Care and Protection cases exists only in Essex and Hampden Counties. For children charged with delinquency offenses, the single mixed system exists in the Roxbury-Dorchester area serviced by our Youth Advocacy Project. For both cost control and quality control reasons, we must begin moving now toward establishment of a counsel assignment model which emulates that which has long proved effective in providing criminal defense services. Our requests for modest and cost-effective expansion in lines 1503 (Children and Family Law) and 1504 (Youth Advocacy) warrant your consideration and support.